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UNCITRAL Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

Note by the Secretariat

Addendum

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

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TRAVAUX PRÉPARATOIRES ON ARTICLE IV

The *travaux préparatoires* on article IV as adopted in 1958 are contained in the following documents:

Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards and comments by Governments and Organizations:

- Report of the Committee on the Enforcement of International Arbitral Awards: E/2704 and Annex.
- Comments by Governments and Organizations on the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Annexes I-II of E/2822; E/CONF.26/3; E/CONF.26/3/Add.1.
- Activities of Inter-Governmental and Non-Governmental Organizations in the Field of International Commercial Arbitration: Consolidated Report by the Secretary-General: E/CONF.26/4.

United Nations Conference on International Commercial Arbitration:

- Amendments to the Draft Convention Submitted by Governmental Delegations: E/CONF.26/L.17; E/CONF.26/L31; E/CONF.26/L.34.
- Comparison of Drafts Relating to Articles III, IV and V of the Draft Convention: E/CONF.26/L.33/Rev.1.
- Further Amendments to the Draft Convention Submitted by Governmental Delegations: E/CONF.26/L.40.
- Text of Articles III, IV and V of the Draft Convention Proposed by Working Party III: E/CONF.26/L.43.
- Text of Articles Adopted by the Conference: E/CONF.26/L.48.
- Text of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards as Provisionally Approved by Drafting Committee: E/CONF.26/L.61; E/CONF.26/8.

Summary records:

- Summary Records of the Eleventh, Twelfth, Thirteenth, Fourteenth, Seventeenth and Twenty-third Meetings of the United Nations Conference on International Commercial Arbitration.
- Summary Record of the Seventh Meeting of the Committee on the Enforcement of International Arbitral Awards.

(Available on the Internet at www.uncitral.org)

INTRODUCTION

1. Article IV of the Convention governs the formal conditions which an applicant must meet in order to obtain recognition and enforcement of an award in accordance with article III. Its purpose is to ensure that the enforcing court has before it the

necessary evidence that the applicant's request for recognition and enforcement "represents the true state of affairs".[1]

2. In line with the overall goals of the Convention, article IV aims to overcome the drawbacks of the formal requirements that an applicant had to meet under the previous regimes for obtaining recognition and enforcement of awards.

3. As discussed elsewhere in this guide,[2] one of the principal barriers to recognition and enforcement prior to the adoption of the Convention was the requirement of a "double exequatur".[3] The 1927 Geneva Convention required that the party relying upon an award or seeking its enforcement supply, inter alia, "[d]ocumentary or other evidence to prove that the award ha[d] become final [...] in the country in which it was made".[4] In practice, in most countries, proof of finality could only be obtained by seeking leave for recognition and enforcement before the national courts and, thus, applicants seeking enforcement of an award had to provide proof of exequatur of the award in the country of the seat of the arbitration.[5] In addition to proof of finality of the award, the 1927 Geneva Convention required that the applicant produce a variety of other documentation.[6] As a result, an important burden was placed on the party seeking to obtain recognition and enforcement of an award.

4. The New York Convention eliminated the requirement that the applicant provide proof of finality of the award. While the first draft of article IV set out very similar requirements to those of the 1927 Geneva Convention,[7] in the course of the negotiations, this idea was abandoned. The initiative first came from the delegate of the Netherlands who noted that demanding that the applicant prove that the award had become final or that its enforcement had not been suspended by a court in the country where it was made meant requiring proof of negative facts and thus placing

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[1] Emilia Onyema, *Formalities of the Enforcement Procedure (Articles III and IV)*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE 597, at 605 (E. Gaillard, D. Di Pietro eds., 2008).

[2] See the chapter on article V.

[3] See Jan Kleinheisterkamp, *Recognition and Enforcement of Foreign Arbitral Awards*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, paras. 9-12 (www.mpepil.com/, last updated 2008); Dirk Otto, *Article IV*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 143, at 145 (H. Kronke, P. Nacimiento eds., 2010).

[4] See article 4 of the 1927 Geneva Convention.

[5] Dirk Otto, *Article IV*, supra at note 3, at 145; REINMAR WOLFF, *Commentary on Article IV*, in THE NEW YORK CONVENTION: A COMMENTARY 207, at 209 (R. Wolff ed., 2012).

[6] See article 4(1)(3) of the 1927 Geneva Convention (obligating the applicant to provide documentation showing, inter alia, that the prerequisites of article 1(2)(a) and (c) were met, which in turn required that "the award ha[d] been made in pursuance of a submission to arbitration which [was] valid under the law applicable thereto" and that "the award ha[d] been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure").

[7] *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Report of the Committee on the Enforcement of International Arbitral Awards, E/2704, E/AC.42/4/Rev.1, Annex, at 3.

a significant onus on the applicant.[8] The Dutch delegate proposed that the applicant be required to provide only the arbitral award and the arbitration agreement (and, where relevant, a translation thereof) and that the burden of proving that the award was not final in the country of the seat be shifted onto the party opposing recognition and enforcement. In the course of the negotiations, other delegations supported the Dutch proposal,[9] and the final version of article IV ultimately abolished the requirement that proof of finality be furnished by the applicant.[10]

5. Pursuant to article IV(1), an applicant seeking recognition and enforcement of an award is required to supply the enforcing court with two documents: the duly authenticated original award (or a duly certified copy) and the original agreement referred to in article II (or a duly certified copy). Pursuant to article IV(2), if these two documents are not made in an official language of the country in which recognition or enforcement is sought, the applicant is required to produce a translation thereof.

6. Thus, article IV of the Convention imposes significantly fewer requirements compared to the 1927 Geneva Convention. In this way, the Convention eliminates unnecessary formalities and ensures that foreign arbitral awards are recognized and enforced as early as possible.[11]

ANALYSIS

GENERAL PRINCIPLES

A. Prima facie right to recognition and enforcement

7. National courts have held that, once the applicant has supplied the documents referred to in article IV, it is deemed that it has obtained a prima facie right to recognition and enforcement of the award.

8. For example, the English Court of Appeal has held that, once a party seeking recognition or enforcement has, under section 102(1) of the 1996 Arbitration Act (which incorporates article IV of the Convention), produced the duly authenticated award or a duly certified copy and the original arbitration agreement or a duly

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[8] *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Recognition and Enforcement of Foreign Arbitral Awards, Comments by Governments on the draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, E/CONF.26/3/Add.1, para. 7.

[9] *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Record of the Twelfth Meeting, E/CONF.26/SR.12, at 4; *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Record of the Seventeenth Meeting, E/CONF.26/SR.17, at 2.

[10] This has been hailed as a "revolution" and "one of the principal achievements of the New York Convention". See ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION (1981), at 247; Emmanuel Gaillard, *The Relationship of the New York Convention with Other Treaties and with Domestic Law*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE 69, at 87 (E. Gaillard, D. Di Pietro eds., 2008).

[11] It should be noted that article 35 (2) of the UNCITRAL Model Law on Arbitration, which mirrors article IV of the Convention, has been amended in 2006 to liberalize formal requirements: no "duly authenticated" or "certified copies" of the award are required and presentation of a copy of the arbitration agreement is also no longer required.

certified copy, it attains a prima facie right to recognition and enforcement.[12] Thereafter, according to that court, recognition and enforcement may be refused only if the party opposing recognition and enforcement proves that the situation falls within the scope of section 103(2) of the Arbitration Act (which incorporates article V(1) of the Convention).[13] The Italian Court of Cassation has similarly held that the burden on the party requesting enforcement is limited to the production of the documents required under article IV, whereupon there is a presumption of enforceability of the award.[14] Courts from other jurisdictions, including Japan, Spain and the United States, have adopted the same approach.[15]

B. An exhaustive set of requirements

9. Article IV(1) lists two items that the applicant should supply to the enforcing court in order to have the award recognized and enforced: the duly authenticated original award (or a duly certified copy) and the original agreement referred to in article II (or a duly certified copy). A handful of cases have addressed the issue of whether the documents referred to under article IV(1) and, if applicable, a translation thereof, are the only documents that an applicant must supply in order to obtain recognition or enforcement.

10. The majority of courts have ruled that the documents required under article IV are the only documents an applicant should provide to obtain recognition and enforcement of an award. For example, the Italian Court of Cassation has held that, pursuant to article IV, the party seeking enforcement has to submit only the original award and the arbitration agreement.[16] In the same vein, the Spanish Supreme Court has ruled that article IV requires the party seeking enforcement to supply only the award and arbitration agreement when filing its application. According to the Spanish Supreme Court, further documentation may be filed in response to any defences raised by the party opposing enforcement, but only after these have been raised.[17] The Supreme Court of Greece has also held that, in order to obtain enforcement, an applicant has only to provide the documents referred to under

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[12] *Yukos Oil Co v. Dardana Ltd.*, Court of Appeal, England and Wales, 18 April 2002, [2002] EWCA Civ 543.

[13] *Id.*

[14] *WTB — Walter Thosti Boswau Bauaktiengesellschaft v. Costruire Coop. srl*, Court of Cassation, Italy, 7 June 1995, 6426.

[15] See, e.g., *Buyer v. Seller*, High Court of Tokyo, Japan, 27 January 1994, XX Y.B. COM. ARB. 742 (1995); *Cominco France S. A. v. Soquiber S. L.*, High Court of Justice, Spain, 24 March 1982, VIII Y.B. COM. ARB. 408 (1983); *Czarina, L.L.C. v. W.F. Poe Syndicate*, Court of Appeals, Eleventh Circuit, United States of America, 4 February 2004, 358 F.3d 1286. See also ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, supra at note 10, at 247-248; Emilia Onyema, *Formalities of the Enforcement Procedure (Articles III and IV)*, supra at note 1, at 605.

[16] *Tortora Amedeo v. Tolimar S.A.*, Court of Cassation, Italy, 27 June 1983, 4399, X Y.B. COM. ARB. 470 (1985).

[17] *Kil Management A/S (Denmark) v. J. García Carrión, SA (Spain)*, Supreme Court, Civil Chamber, Spain, 28 March 2000, 1724 of 1998, XXXII Y.B. COM. ARB. 518 (2007).

article IV.[18] Courts from other jurisdictions — including Austria, Mexico and the Netherlands — have followed the same path.[19]

11. During the drafting of article IV, a proposal was made that the applicant be required — as under the 1927 Geneva Convention — to supply additional "documentary and other evidence" in order to obtain the right to recognition and enforcement of an award.[20] This proposal was rejected. It is thus clear that the drafters of the Convention considered the possibility of requiring additional documents to be provided by applicants and squarely dismissed it.

12. Commentators have confirmed the understanding that, in order to have an award recognized and enforced, an applicant is only required to supply the documents listed under article IV.[21]

C. Whether applicants can supply some, but not all, article IV documents

13. Article IV requires that the applicant "shall [...] supply" the documents specified therein. The issue has arisen before courts whether an applicant must strictly comply with article IV or whether a more flexible approach could be applied.

a. Documents specified under article IV(1)

14. Reported case law shows that some courts have insisted that the applicant provide all requisite documents in the form prescribed by article IV(1), whereas others have granted recognition and enforcement of an award despite the fact that the applicant had not provided the duly authenticated award or the original arbitration agreement (or duly certified copies thereof).

15. In some cases, courts have denied enforcement due to the applicant's failure to provide one or both of the documents as required under article IV(1). For example, Italian courts have denied requests for recognition and enforcement on the ground that the applicant had not submitted a duly authenticated award or a certified

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[18] See Supreme Court, Greece, 1973, Case No. 926, I Y.B. COM. ARB. 186 (1976). See also Court of Appeal of Athens, Greece, 1972, Case No. 2768, I Y.B. COM. ARB. 186 (1976).

[19] See Supreme Court, Austria, 21 February 1978, X Y.B. COM. ARB. 418 (1985); *Presse Office S.A. v. Centro Editorial Hoy S.A.*, High Court of Justice, Eighteenth Civil Court of First Instance for the Federal District of Mexico, Mexico, 24 February 1977, IV Y.B. COM. ARB. 301 (1979); *Palm and Vegetable Oils SDN. BHD. v. Algemene Oliehandel International B.V.*, President of the Court of Utrecht, Netherlands, 22 November 1984, XI Y.B. COM. ARB. 521 (1986). For a minority view pursuant to which denial of recognition and enforcement could be based on the failure to provide additional documents such as a certificate that the award had entered into force or the applicable arbitration rules, see, respectively, *ECONERG Ltd. v. National Electricity Company AD*, Supreme Court of Appeal, Civil Collegium, Fifth Civil Department, Bulgaria, 23 February 1999, 356/99, XXV Y.B. COM. ARB. 641 (2000); *Glencore Grain Ltd. V. TSS Grain Millers Ltd.*, High Court of Mombasa, Kenya, 5 July 2002, Civil Suit No. 388 of 2000, XXXIV Y.B. COM. ARB. 666 (2009).

[20] See *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Record of the Seventeenth Meeting, E/CONF.26/SR.17, at 6-7 (the proposal was that the applicant be required to supply "documentary and other evidence to prove that the conditions laid down in the following articles have been fulfilled").

[21] See Emilia Onyema, *Formalities on the Enforcement Procedure (Articles III and IV)*, supra at note 1, at 605; Dirk Otto, *Article IV*, supra at note 3, at 148; ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION, supra at note 10, at 248.

arbitration agreement.[22] Similarly, the Spanish Supreme Court has denied enforcement where the applicant failed to provide the documents listed under article IV. In one case, enforcement was not granted because the applicant had failed to provide the arbitration agreement referred to under article IV(1)(b) of the Convention.[23] In another, the court denied enforcement because, contrary to the requirements of article IV, the applicant supplied uncertified and non-authenticated copies of the awards and also failed to provide the arbitration agreement.[24] Both Chinese[25] and United States[26] courts have also denied enforcement in circumstances where a party had failed to provide a document as required under article IV.

16. Swiss courts have adopted a more flexible approach. For example, in cases where the applicant had failed to show that the relevant document was duly authenticated or duly certified, they have held that enforcement should be granted if the party opposing recognition and enforcement does not dispute the authenticity of that document.[27] In a case before the Commercial Court in Zurich, the court granted enforcement, despite the fact that the applicant had submitted a non-certified photocopy of the award.[28] The court held that too strict a standard should not be applied to the formal requirement for the submission of documents when the conditions for recognition are undisputed and are beyond doubt.

17. Other courts have granted enforcement despite the fact that the applicant had not provided a duly authenticated original award or the original arbitration agreement (or a duly certified copy thereof). To do so, German courts have often relied on the more-favourable-right principle set out in article VII,[29] holding that it

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[22] *Jassica S.A. v. Ditta Polojaz*, Court of Cassation, Italy, 12 February 1987, 1526, XVII Y.B. COM. ARB. 525 (1992). See also *Israel Portland Cement Works (Nesher) Ltd. v. Moccia Irme SpA*, Court of Cassation, Italy, 19 December 1991, 13665, XVIII Y.B. COM. ARB. 419 (1993); *Globtrade Italiana srl v. East Point Trading Ltd.*, Court of Cassation, Italy, 8 October 2008, 24856.

[23] *Glencore Grain Limited (UK) v. Sociedad Ibérica de Molturación, S.A. (Spain)*, Supreme Court, Spain, 14 January 2003, 16508/2003, XXX Y.B. COM. ARB. 605 (2005).

[24] *Satico Shipping Company Limited (Cyprus) v. Maderas Iglesias (Spain)*, Supreme Court, Civil Chamber, Spain, 1 April 2003, 2009 of 2001, XXXII Y.B. COM. ARB. 582 (2007).

[25] *Hanjin Shipping Co., Ltd. v. Guangdong Fuhong Oil Co., Ltd.*, Supreme People's Court, China, 2 June 2006, [2005] Min Si Ta Zi No. 53; *Concordia Trading B.V. v. Nantong Gangde Oil Co., Ltd.*, Supreme People's Court, China, 3 August 2009, [2009] Min Si Ta Zi No. 22.

[26] See *Czarina, L.L.C. v. W.F. Poe Syndicate*, Court of Appeals, Eleventh Circuit, United States of America, 4 February 2004, 358 F.3d 1286; *Guang Dong Light Headgear Factory Co. v. ACI Int'l, Inc*, District Court, District of Kansas, United States of America, 10 May 2005, 03-4165-JAR.

[27] Commercial Court of Zurich, Switzerland, 20 April 1990, 21, XVII Y.B. COM. ARB. 584 (1992); *Inter Maritime Management SA v. Russin & Vecchi*, Federal Tribunal, Switzerland, 9 January 1995, XXII Y.B. COM. ARB. 789 (1997); Federal Tribunal, Switzerland, 4 October 2010, 4A_124/2010; Federal Tribunal, Switzerland, 10 October 2011, 5A_427/2011.

[28] Commercial Court of Zurich, Switzerland, 20 April 1990, 21, XVII Y.B. COM. ARB. 584 (1992).

[29] See Bayerisches Oberstes Landesgericht [BayObLG], Germany, 11 August 2000, 4 Z Sch 05/00; Oberlandesgericht [OLG] München, Germany, 15 March 2006, 34 Sch 06/05; Kammergericht [KG], Germany, 10 August 2006, 20 Sch 07/04; Oberlandesgericht [OLG] Celle, Germany, 14 December 2006, 8 Sch 14/05; Oberlandesgericht [OLG] München, Germany, 23 February 2007, 34 Sch 31/06. For a more detailed discussion on the interaction of articles IV and VII, see the chapter on article VII, paras. 36-38.

is not necessary that the applicant supply the arbitration agreement under article IV(1)(b), because domestic German law does not so require.

b. Documents specified under article IV(2)

18. Courts have sometimes taken a flexible approach in relation to the article IV(2) requirement that the applicant provide a translation of the documents referred to under article IV(1). For example, Dutch courts have deemed translations to be unnecessary where the relevant documents were drawn up in languages that they understand.[30] In a case before the District Court of Amsterdam, the applicant provided certified copies of the award and the arbitral agreement, both of which were in English, but failed to supply Dutch translations.[31] Noting that it mastered the English language sufficiently, the court did not require translations to be submitted and concluded that the article IV requirements were met.[32]

19. A Norwegian court also held that, in light of the fact that it had sufficient command of the language in which the award was drafted, there was no need for a translation thereof to be submitted.[33]

20. As in the case of documents required under article IV(1), German courts have relied on article VII(1) of the Convention and held that an applicant need not provide a translation for its request to be deemed admissible.[34] Similarly, they have held that when translations are provided, they are not subject to the certification requirements of article IV(2).[35]

D. "[A]t the time of the application"

21. Article IV expressly provides that the applicant shall supply the documents listed thereunder "at the time of the application". The question has arisen whether, where an applicant has failed to submit the requisite documents at the time of application, it can do so at a later stage in the enforcement proceedings.

22. Italian courts have held that failure to provide the requisite documents listed under article IV at the very moment when the application is made would lead to a

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[30] *China Packaging Design Corporation v. SCA Recycling Reukema Trading B.V.*, Court of First Instance of Zutphen, Netherlands, 11 November 1998, XXIV Y.B. COM. ARB. 724 (1999). See also *LoJack Equipment Ireland Ltd. (Ireland) v. A*, Commercial Court of Amsterdam, Netherlands, 18 June 2009, 411230/KG RK 08-3652, XXXIV Y.B. COM. ARB. 715 (2009).

[31] *China Packaging Design Corporation v. SCA Recycling Reukema Trading B.V.*, Court of First Instance of Zutphen, Netherlands, 11 November 1998, XXIV Y.B. COM. ARB. 724 (1999).

[32] *SPP (Middle East) Ltd. v. The Arab Republic of Egypt*, President of the District Court of Amsterdam, Netherlands, 12 July 1984, X Y.B. COM. ARB. 487 (1985).

[33] *Pulsarr Industrial Research B.V. (Netherlands) v. Nils H. Nilsen A.S. (Norway)*, Enforcement Court of Vardø, Norway, 10 July 2002, XXVIII Y.B. COM. ARB. 821 (2003).

[34] Bayerisches Oberstes Landesgericht [BayObLG], Germany, 11 August 2000, 4 Z Sch 05/00; *K Trading Company (Syria) v. Bayerischen Motoren Werke AG (Germany)*, Bayerisches Oberstes Landesgericht [BayObLG], Germany, 23 September 2004, 4Z Sch 005-04; Kammergericht [KG], Germany, 10 August 2006, 20 Sch 07/04.

[35] Oberlandesgericht [OLG] Schleswig, Germany, 15 July 2003, 16 Sch 01/03; Bundesgerichtshof [BGH], Germany, 25 September 2003, III ZB 68/02.

rejection of the application for recognition and enforcement.[36] The approach of Italian courts appears to stem from their consideration of the production of the arbitral award and the arbitration agreement as a procedural prerequisite for the commencement of the enforcement proceedings.[37] At the same time, the Italian Court of Cassation has clarified that the rejection of an application for failure to produce the requisite documents does not affect the merits of the enforcement request and, therefore, does not prevent a subsequent application to be made de novo.[38]

23. Most other courts have held that an applicant could provide the requisite documents in the course of the enforcement proceedings. For example, in a case before the Chinese courts, the Supreme People's Court reversed a ruling of the Shanxi Province High Court denying enforcement because the applicant had failed to provide a certified copy of the arbitration agreement.[39] The Supreme People's Court found that the application should not be rejected on the sole ground that the submitted materials were incomplete and that such incompleteness should not be a basis for refusal to recognize and enforce the arbitral award. It held that, rather, in such circumstances, the applicant should be ordered to supplement the outstanding materials within a reasonable period.

24. Courts in Switzerland,[40] the United States[41] and India[42] have also taken this approach and have generally granted enforcement of an award where the relevant document had not been supplied with the application, but was ultimately produced in the course of the proceedings.

ARTICLE IV(1)(a)

25. Article IV(1)(a) requires the applicant to produce "[t]he duly authenticated original award or a duly certified copy thereof" in order to obtain recognition and enforcement of an award.

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[36] See *Lezina Shipping Co. SA v. Casillo Grani snc*, Court of Appeal of Bari, Italy, 19 March 1991, XXI Y.B. COM. ARB. 585 (1996); *Israel Portland Cement Works (Nesher) Ltd. v. Moccia Irme SpA*, Court of Cassation, Italy, 19 December 1991, 13665, XVIII Y.B. COM. ARB. 419 (1993); *s.r.l. Ditta Michele Tavella v. Palmco Oil Mill L.D.N. B.M.D.*, Court of Cassation, Italy, 12 November 1992, 12187, XIX Y.B. COM. ARB. 692 (1994); *srl Campomarzio Impianti v. Lampart Vegypary Gepgyar*, Court of Cassation, Italy, 20 September 1995, 9980, XXIV Y.B. COM. ARB. 698 (1999); *Microware s.r.l. in liquidation v. Indicia Diagnostics S.A*, Court of Cassation, Italy, 23 July 2009, 17291.

[37] *Lezina Shipping Co. SA v. Casillo Grani snc*, Court of Appeal of Bari, Italy, 19 March 1991, XXI Y.B. COM. ARB. 585 (1996).

[38] *s.r.l. Campomarzio Impianti v. Lampart Vegypary Gepgyar*, Court of Cassation, 20 September 1995, Italy, 9980, XXIV Y.B. COM. ARB. 698 (1999) (overruling *Israel Portland Cement Works (Nesher) Ltd. v. Moccia Irme SpA*, Court of Cassation, Italy, 19 December 1991, 13665, XVIII Y.B. COM. ARB. 419 (1993)).

[39] *Wei Mao International (Hong Kong) Co. Ltd. (Hong Kong SAR) v. Shanxi Tianli Industrial Co. Ltd. (China PR)*, Supreme People's Court, China, 5 July 2004.

[40] Federal Tribunal, Switzerland, 8 December 2003, 4P.173/2003/ech.

[41] *China National Building Material Investment Co. Ltd. v. BNK International*, District Court, Western District of Texas, Austin Division, United States of America, 3 December 2009, A-09-CA-488-SS.

[42] *Renusagar Power Company v. General Electric Company*, High Court of Bombay, India, 12 October 1989.

26. Reported case law on article IV(1)(a) addresses principally issues related to the form and content in which the award[43] is supplied by the applicant and the processes of authentication and certification.

A. The requirement that the applicant provide the "award"

a. The content of the award

27. Article IV does not set out any specific requirements as to what must be contained in an award in order for it to be deemed appropriate for recognition and enforcement. Several elements of this kind have been considered by courts.

28. *The entirety of the award.* In an obiter dictum, an Austrian court has stated that the term "award" under article IV refers to the entirety of the award, including the introduction, dictum and reasons for the decision.[44]

29. *The names of the parties.* In one case, the Supreme Court of New South Wales held that the names of the parties must appear on the award. In that case, the party opposing enforcement argued that the name used for the respondent in the award was not its name. The court examined the award and ascertained that the award did refer to the party opposing enforcement, albeit using an incorrect name.[45]

30. One commentator has argued that the names of the parties should be present in the award supplied by the applicant in order for the award to be enforceable.[46]

31. *The names and signatures of the arbitrators.* There has been more debate among courts as to whether the award supplied by an applicant must contain the names and signatures of all arbitrators and whether the signatures of all arbitrators must be authenticated.

32. In past decisions, two courts — in two different contexts — have required that the award produced bear the (authenticated) signatures of the three arbitrators. Thus, in the first case, an Italian court had held that the signatures of all arbitrators must be authenticated on the copy provided by the applicant.[47] In that case, the applicant sought enforcement of an award rendered in London. The court denied enforcement of the award, having found that only two of the three arbitrators' signatures were authenticated. The court noted that, while under English law the authentication of two signatures would have sufficed for the award to be considered authentic, under Italian law — which the enforcing court deemed to govern the authentication — all signatures needed to be authenticated. Thus, the court's ruling is not founded on article IV, but rather stems from its application of Italian law.

33. In the second case, a German court denied an application for the enforcement of an award rendered pursuant to the Copenhagen Arbitration Committee for Grain and Feedstuff Trade, inter alia, on the ground that the copy of the award presented

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[43] The question of what constitutes an award is dealt with above, and will not be discussed here.

[44] *D SA (Spain) v. W GmbH (Austria)*, Supreme Court, Austria, 26 April 2006, 3Ob211/05h, XXXII Y.B. COM. ARB. 259 (2007).

[45] *LKT Industrial Berhad (Malaysia) v. Chun*, Supreme Court of New South Wales, Australia, 13 September 2004, 50174.

[46] Dirk Otto, *Article IV*, supra at note 3, at 152-153.

[47] *SODIME — Società Distillerie Meridionali v. Schuurmans & Van Ginneken BV*, Court of Cassation, Italy, 14 March 1995, 2919, XXI Y.B. COM. ARB. 607 (1996).

by the applicant did not contain the names of the arbitrators.[48] The court noted that, under the Rules of the Copenhagen Arbitration Committee for Grain and Feedstuff Trade in force at the time, the parties to an arbitration are provided an extract of the award which does not contain the names of the arbitrators other than the president of the Committee. The court held that this did not alter the fact that, under article IV, a copy of an award must fully reflect the original award, including the names and signatures of the arbitrators.

34. On the other hand, in a 2010 decision, the Swiss Federal Tribunal granted enforcement despite the fact that one or more signatures were not present on the award provided by the applicant. The court rejected the argument of the party opposing enforcement that the applicant had failed to satisfy the conditions of article IV because it had produced an award signed only by the chairman of the arbitral tribunal. The court held that the form requirements under article IV were not to be interpreted restrictively since the purpose of the Convention was to facilitate the enforcement of arbitral awards.[49]

b. The form of the award

i. Partial awards

35. In two cases before the Italian courts, an issue arose whether, in addition to supplying the final award on damages, the applicant should have provided the partial award on liability in order to obtain recognition and enforcement.

36. In the first, the Court of Appeal of Bologna denied enforcement after finding that, in the circumstances of that case, the final award was inseparable from the partial award. The court reasoned that the latter was necessary as the former did not ascertain liability nor did it order the party against whom enforcement was sought to make any payment.[50]

37. In the second, the Court of Cassation reversed the decision of the lower court rejecting a request for enforcement on the ground that the applicant failed to provide a copy of the partial award together with the final award.[51] The Court of Cassation held that once the applicant supplied the final award, it satisfied the requirements of article IV, and that the lower court should rather have analysed whether the enforcement of the final award separately from the partial award could fall within one of the exhaustively listed grounds for refusing enforcement under article V(1) or article V(2).

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[48] Oberlandesgericht [OLG] Köln, Germany, 10 June 1976, IV Y.B. COM. ARB. 258 (1979).

[49] Federal Tribunal, Switzerland, 4 October 2010, 4A_124/2010. In this regard, see also Dirk Otto, *Article IV*, supra at note 3, at 154. The Austrian Supreme Court has held that an award signed by a majority of arbitrators can be recognized as long as there is an explanation as to why an arbitrator has not signed the award. See Supreme Court, Austria, 13 April 2011, 3 Ob 154/10h.

[50] Court of Appeal of Bologna, Italy, 4 February 1993, XIX Y.B. COM. ARB. 700 (1994).

[51] *WTB — Walter Thosti Boswau Bauaktiengesellschaft v. Costruire Coop. srl*, Court of Cassation, Italy, 7 June 1995, 6426.

ii. Dissenting opinions

38. Courts have consistently held that the applicant satisfies the requirements of article IV even if it has not provided the dissenting opinion in cases where such dissenting opinion exists.[52]

39. The Austrian Supreme Court considered an argument from the party opposing enforcement that, in order to obtain recognition and enforcement of an ICC award under article IV, the applicant was obligated to also supply the dissenting opinion of one of the arbitrators. In dismissing the argument, the court held that a dissenting opinion was a separate document from the award, which is not approved by the ICC International Court of Arbitration and that there was no obligation to supply the dissenting opinion, since it was not part of the arbitral award.[53]

40. The High Court of Bombay has also held that the applicant need not provide the "minority opinion".[54] The party opposing enforcement argued that the applicant had failed to comply with section 8(1)(a) of the Indian Foreign Awards Act of 1961 (like article IV, requiring that the petitioner produce the original award or a copy thereof) because it had failed to supply the minority opinion prepared by one of the arbitrators. The court rejected the submission, noting that, in accordance with the ICC arbitration rules in force at the time, the award was to be declared by a majority opinion and, therefore, what was enforceable was solely the majority award.[55]

iii. Merger of a judgment and an award

41. A Swiss court has considered whether a judgment of a United States court confirming an award could be sufficient basis for enforcement.[56] The *Camera di Esecuzione e Fallimenti del Tribunale d'Appello* (Debt Collection and Bankruptcy Chamber of the Court of Appeal) held that an enforcement decision could not be issued based on the judgment of the United States court. It acknowledged that under the "doctrine of merger" applicable in the United States, a court could confirm an award rendered in the United States with the effect that the judgment of the United States court and the award become one and the same. It then held that Swiss law did not have the doctrine of merger and under Swiss law, enforcement had to be based on an enforceable award. The Court of Appeal also observed that the award creditor had not complied with the requirements of article IV as it had not provided the original arbitration agreement and a duly certified copy of the award.

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[52] Unless the applicable arbitration rules provide otherwise, a dissenting opinion does not form part of the award. See FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (E. Gaillard, J. Savage eds., 1999), at 768, para. 1404.

[53] *D SA (Spain) v. W GmbH (Austria)*, Supreme Court, Austria, 26 April 2006, 3Ob211/05h, XXXII Y.B. COM. ARB. 259 (2007).

[54] The High Court of Bombay appears to have used the terms "minority opinion" and "minority award" interchangeably, whereas it did not use the term "dissenting opinion".

[55] *General Electric Company v. Renusagar Power Company*, High Court of Bombay, India, 21 October 1988.

[56] Debt Collection and Bankruptcy Chamber of the Court of Appeal of the Republic and Canton of Ticino, Switzerland, 27 November 2008, 14.2008.78.

B. Authentication and certification

42. Neither the text of article IV nor the *Travaux préparatoires* of the provision provide a definition of the terms "authenticated" and "certified".

43. There is very little case law in which an express definition of the terms "authenticated" and "certified" is discussed. An Austrian court has held that authentication means confirmation that the signatures of the arbitrators are authentic.[57] The same court has held that certification is the process by which a copy of a document is attested to be a true copy of the original document.[58]

44. Commentators are in agreement that the process of authentication entails a confirmation of the authenticity of the arbitrators' signatures and that certification is a confirmation that the document provided is a true copy of the original.[59]

45. Under the rubric of article IV(1)(a), courts have dealt with a number of issues, including, principally, the law governing the process of authentication and/or certification, the authority competent to perform the authentication and/or certification, and whether certification must be done of an authenticated award.

a. Governing law

46. While the 1927 Geneva Convention required that the authentication of an award be done in accordance with the law of the country in which the award was made,[60] article IV(1)(a) does not provide the law governing authentication and certification. During the negotiations, the Ad Hoc Committee of the United Nations Economic and Social Council considered that a different approach should be taken in the New York Convention. The Committee explained that "it was preferable to allow a greater latitude with regard to this question to the tribunal of the country in which the recognition or enforcement was being requested".[61] It considered that the term "duly authenticated" allows such an approach.[62] At the same time, some participants in the drafting did not consider that the terms "duly authenticated" and "duly certified" made it sufficiently clear that the enforcing court was given wide

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[57] *O Limited (Cyprus) v. M Corp. (formerly A, Inc.) (US) and others*, Supreme Court, Austria, 3 September 2008, 3Ob35/08f, XXXIV Y.B. COM. ARB. 409 (2009).

[58] Ibid. See also *Glencore Grain Ltd. v. TSS Grain Millers Ltd.*, High Court of Mombasa, Kenya, 5 July 2002, Civil Suit No. 388 of 2000, XXXIV Y.B. COM. ARB. 666 (2009); Federal Tribunal, Switzerland, 4 October 2010, 4A_124/2010.

[59] See FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (E. Gaillard, J. Savage eds., 1999), at 970, para. 1675; ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION, supra at note 10, at 251; Dirk Otto, *Article IV*, supra at note 3, at 177, 179; ICCA'S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION: A HANDBOOK FOR JUDGES (P. Sanders ed., 2011), at 72, 74; REINMAR WOLFF, THE NEW YORK CONVENTION, supra at note 5, at 210.

[60] See article 4(1)(1) 1927 Geneva Convention.

[61] *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Report of the Committee on the Enforcement of International Arbitral Awards, E/2704, E/AC.42/4/Rev.1, at 14.

[62] Ibid.

discretion.[63] The adopted text maintained the wording "duly authenticated" and "duly certified" and no applicable law was specified.

47. The lack of a stipulated governing law on authentication and certification has enabled courts to adopt varying approaches. Some courts have considered that the law of the State in which the award was made ought to be applied to the process of authentication, whereas others have emphasized the fact that authentications carried out in accordance with either the law of the enforcing State or the law of the State in which the award was made would be compliant with article IV(1).

48. One German court has considered that, for the sake of practicality, authentication should be governed by the law of the State where enforcement is sought.[64] Similarly, Italian courts have taken the position that the applicable rules ought to be those of the enforcing State.[65]

49. Another court reasoned that the New York Convention does not specify the governing law and held that a party seeking enforcement is free to submit an award authenticated pursuant to either the law in which the award was made or the law of the country where enforcement was sought.[66] The court added that authentication by the diplomatic or consular agents of the enforcing State might help avoiding difficulties on the practical level.

50. A number of authors have taken the view that, under article IV, and consistent with the *travaux préparatoires*,[67] an applicant can comply with the authentication requirements under either the law of the State in which the award was made or the law of the State in which enforcement is sought.[68]

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[63] *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Recognition and Enforcement of Foreign Arbitral Awards, Comments by Governments on the draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, E/CONF.26/3, at 3; *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Activities of Inter-Governmental and Non-Governmental Organizations in the Field of International Commercial Arbitration, Consolidated Report by the Secretary-General, E/CONF.26/4, at 29.

[64] Oberlandesgericht [OLG] Schleswig, Germany. 15 July 2003, 16 Sch 01/03.

[65] See *Globtrade Italiana srl v. East Point Trading Ltd.*, Court of Cassation, Italy, 8 October 2008, 24856. See *SODIME – – Società Distillerie Meridionali v. Schuurmans & Van Ginneken BV*, Court of Cassation, Italy, 14 March 1995, 2919, XXI Y.B. COM. ARB. 607 (1996). Previously, an Italian court had taken the position that the law governing authentication should be the law of the State in which the award was made, see *Renato Marino Navegacio s.a. v. Chim-Metal s.r.l*, Court of Appeal of Milan, Italy, 21 December 1979, VII Y.B. COM. ARB. 338 (1982). See also *ECONERG Ltd. v. National Electricity Company AD*, Case No. 356/99, Supreme Court of Appeal, Civil Collegium, Fifth Civil Department, Bulgaria, 23 February 1999, 356/99, XXV Y.B. COM. ARB. 641 (2000); *Renusagar Power Company v. General Electric Company*, High Court of Bombay, India, 12 October 1989.

[66] Supreme Court, Austria, 11 June 1969, 3, II Y.B. COM. ARB. 232 (1977).

[67] See supra, para. 46.

[68] See FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (E. Gaillard, J. Savage eds., 1999), at 970, para. 1675; ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION, supra at note 10, at 252-254; Dirk Otto, *Article IV*, supra at note 3, at 178; REINMAR WOLFF, THE NEW YORK CONVENTION, supra at note 5, at 212.

b. Competent authority

51. Article IV(1)(a) does not specify the competent authority that should perform the authentication or certification. During the negotiations, a proposal that the authority competent to authenticate an award should be the consulate of the country where the award is relied upon was not adopted.[69]

52. Accordingly, courts have found various authorities to be competent to authenticate an award or certify a copy of an award.

53. In different contexts, consular officers,[70] notaries public,[71] the chairperson of the tribunal,[72] and domestic courts[73] have all been considered as authorities competent to perform an authentication.

54. Similarly, consular representatives[74] or notaries public[75] have also been considered to be authorities competent to certify a copy of an award. Some courts have found the arbitral institution under the rules of which the award was made to be competent to certify awards.[76] Members of the arbitral tribunal[77] or its

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[69] *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Record of the Seventeenth Meeting, E/CONF.26/SR.17, at 7.

[70] *Guang Dong Light Headgear Factory Co. v. ACI Int'l, Inc*, District Court, District of Kansas, United States of America, 10 May 2005, 03-4165-JAR; Bundesgerichtshof [BGH], Germany, 16 December 2010, III ZB 100/09.

[71] Oberlandesgericht [OLG] Rostock, Germany, 28 October 1999; Bundesgerichtshof [BGH], Germany, 16 December 2010, III ZB 100/09.

[72] *Inter-Arab Investment Guarantee Corporation v. Banque Arabe et Internationale d'Investissements*, Court of Appeal of Brussels, Belgium, 24 January 1997, XXII Y.B. COM. ARB. 643 (1997).

[73] *ECONERG Ltd. v. National Electricity Company AD*, Case No. 356/99, Supreme Court of Appeal, Civil Collegium, Fifth Civil Department, Bulgaria, 23 February 1999, 356/99, XXV Y.B. COM. ARB. 641 (2000).

[74] *Guang Dong Light Headgear Factory Co. v. ACI Int'l, Inc*, District Court, District of Kansas, United States of America, 10 May 2005, 03-4165-JAR; *Presse Office S.A. v. Centro Editorial*, Supreme Court of Justice, Mexico, 24 February 1977, IV Y.B. COM. ARB. 301 (1979); Bayerisches Oberstes Landesgericht [BayObLG], Germany, 23 September 2004, 4Z Sch 005-04.

[75] *Transpac Capital Pte Limited v. Buntoro*, Supreme Court of New South Wales, Common Law Division, Australia, 7 July 2008, 2008/11373; Oberlandesgericht [OLG] Rostock, Germany, 28 October 1999; *Trans-Pacific Shipping Co. v. Atlantic & Orient Shipping Corporation (BVI)*, Federal Court, Canada, 27 April 2005, XXXI Y.B. COM. ARB. 601 (2006).

[76] *Continental Grain Company, et al. v. Foremost Farms Incorporated, et al.*, District Court, Southern District of New York, United States of America, 23 March 1998, 98 Civ. 0848 (DC), XXV Y.B. COM. ARB. 641 (2000); Hanseatisches Oberlandesgericht [OLG] Hamburg, Germany, 27 July 1978, IV Y.B. COM. ARB. 266 (1979); Bundesgerichtshof [BGH], Germany, 16 December 2010, III ZB 100/09.

[77] See, *e.g.*, *Bergesen v. Joseph Müller Corp*, Court of Appeals, Second Circuit, United States of America, 17 June 1983, 710 F.2d 928, IX Y.B. COM. ARB. 487 (1984) (even though here the chairman of the tribunal certified the award, the decision does not exclude the possibility that the other members of the tribunal could do the same: "copies of award and the agreement which have been certified by a member of the arbitration panel provide a sufficient basis upon which to enforce the award").

chairperson,[78] as well as attorneys[79] have also been considered as authorities competent to perform a certification of an award.

55. A Canadian court has held that, in the circumstances of that case, a private individual was competent to certify the copy of the award.[80] The holder of the original award — a private individual — provided an affidavit that the copy provided to the court was an accurate one. Having noted that the party opposing enforcement did not challenge the accuracy or authenticity of the copy but rather merely objected to the attestation, the court accepted the affidavit as sufficient proof that the copy of the award was an accurate copy.

56. Other courts have found that the applicant had not shown that the person who authenticated or certified the copy of the award could, under the circumstances, be deemed competent to do so under the relevant applicable law.[81]

c. Whether certification must be of an authenticated original award

57. Article IV(1)(a) requires the applicant to provide either "the duly authenticated original award" or "a duly certified copy thereof". The question has arisen whether, when supplying a certified copy of an award, that copy must be of a previously authenticated copy or whether a certified copy of the award, without authentication of the signatures of the arbitrators, would suffice. The drafting history of article IV shows that, for a large part of the negotiations, the text of article IV(1)(a) required the applicant to provide either the original award or a certified copy thereof, without there being any requirement for authentication.[82] The authentication prerequisite

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[78] *Bergesen v. Joseph Müller Corp*, Court of Appeals, Second Circuit, United States of America, 17 June 1983, 710 F.2d 928, IX Y.B. COM. ARB. 487 (1984); *Inter-Arab Investment Guarantee Corporation v. Banque Arabe et Internationale d'Investissements*, Court of Appeal of Brussels, Belgium, 24 January 1997, XXII Y.B. COM. ARB. 643 (1997).

[79] *Overseas Cosmos, Inc. v. NR Vessel Corp.*, District Court, Southern District of New York, United States of America, 8 December 1997, 97 Civ. 5898 (DC), XXIII Y.B. COM. ARB. 1096 (1998). The Court previously noted that the genuineness of the arbitration award was not in dispute. See also *Guangdong v. Chiu Shing Trading*, High Court, Supreme Court of Hong Kong, Hong Kong, 23 August 1991, Miscellaneous proceedings No. 1625 of 1991.

[80] *Trans-Pacific Shipping Co. v. Atlantic & Orient Shipping Corporation (BVI)*, Federal Court, Canada, 27 April 2005, XXXI Y.B. COM. ARB. 601 (2006).

[81] *Glencore Grain Ltd. v. TSS Grain Millers Ltd.*, High Court of Mombasa, Kenya 5 July 2002, Civil Suit No. 388 of 2000, XXXIV Y.B. COM. ARB. 666 (2009) (finding that the applicant had not proven that the Director General of the institution that rendered the award had the authority to authenticate awards); *O Limited (Cyprus) v. M Corp. (formerly A, Inc.) (US) and others*, Supreme Court, Austria, 3 September 2008, 3Ob35/08f, XXXIV Y.B. COM. ARB. 409 (2009) (finding that "it cannot be deduced from the LCIA Arbitration Rules that [they] provide that certifications are to be issued by a secretary"); *ECONERG Ltd. v. National Electricity Company AD*, Supreme Court of Appeal, Civil Collegium, Fifth Civil Department, Bulgaria, 23 February 1999, 356/99, XXV Y.B. COM. ARB. 641 (2000) (finding that the award was authenticated neither by the competent authority under the law applicable to the arbitration agreement nor under the law of the enforcing court).

[82] *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Working Party No. 3, Consideration of the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Item 4 of the Agenda), E/CONF.26/L.43, at 1.

was added at a later stage.[83] In other words, the certification requirement had been inserted by the drafters independently from the authentication requirement.

58. Reported case law on this point is scarce, with two courts having taken different approaches.

59. One court has held that when an applicant supplies certified copies of the award, the arbitrators' signatures on the award must be previously authenticated.[84]

60. Conversely, another court has held that in cases where the authenticity of the original award is not disputed, a certified copy of an award which was not previously authenticated would meet the requirements of article IV(1)(a).[85]

61. Commentators have argued that requiring certification to be done on an authenticated award would not accord with the spirit of article IV which, they contend, is to eliminate unnecessary formalism.[86]

ARTICLE IV(1)(b)

62. Article IV(1)(b) provides that, in order to obtain recognition and enforcement, an applicant must also submit to the enforcing court "the original agreement referred to in article II or a duly certified copy thereof". In this context, courts have often considered whether an arbitration agreement provided by the applicant is in conformity with the requirements of article II. This has been examined in detail in the chapter on article II and will not be discussed here anew.

A. The requirement that the applicant provide the arbitration agreement "referred to in article II"

63. Article IV(1)(b) requires the applicant to supply "the original agreement referred to in article II". Accordingly, courts have often considered issues arising out of article II in conjunction with article IV(1)(b), in particular, issues of proof required to meet the requirements of "the original agreement referred to in article II".

64. Courts have found that the applicant bears the burden of supplying documentary evidence that constitutes an "agreement in writing" under article II(2). For example, the Swiss Federal Tribunal has held that, under article IV(1)(b), the burden is upon the applicant to provide an arbitration agreement which meets the requirements of form under article II of the Convention.[87] Likewise, the Spanish courts have held that the applicant bears the burden of proving that the conditions of article IV(1)(b) are met, inter alia, by supplying an arbitration agreement "in the

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[83] *Travaux préparatoires*, Summary Records of the Seventeenth Meeting of the United Nations Conference on International Commercial Arbitration, E/CONF.26/SR.17, at 7.

[84] *O Limited (Cyprus) v. M Corp. (formerly A, Inc.) (US) and others*, Supreme Court, Austria, 3 September 2008, 3Ob35/08f, XXXIV Y.B. COM. ARB. 409 (2009).

[85] Bundesgerichtshof [BGH], Germany, 22 February 2001, III ZB 71/99; Oberlandesgericht [OLG] Rostock, Germany, 28 October 1999.

[86] ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION, supra at note 10, at 256-257; REINMAR WOLFF, THE NEW YORK CONVENTION, supra at note 5, at 215.

[87] Federal Tribunal, Switzerland, 31 May 2002, 4P.102/2001.

form established by Art. IV(1)(b) together with Art. II".[88] The United States Court of Appeals for the Eleventh Circuit has also held that the applicant is required to "meet Article II's agreement-in-writing requirement".[89]

65. Courts have further clarified that, for the purposes of article IV(1)(b), the applicant need only provide prima facie proof of an arbitration agreement.[90] For instance, the English Court of Appeal has held that an applicant can produce "terms in writing, containing an arbitration clause" or a "record" of an arbitration agreement made in writing, explaining that "all that is probably required at the first stage [...] is apparently valid documentation containing an arbitration claus[e]".[91] Similarly, the High Court in Singapore ruled that "a document produced to a court in accordance with [the Section of the Singaporean International Arbitration Act transposing article IV(1)(b) of the Convention] shall, upon mere production be received by the court as prima facie evidence of the matters to which it relates".[92]

66. As discussed above and elsewhere in this guide,[93] German courts have often relied on the more-favourable-right principle under article VII(1) to hold that it is not necessary for an applicant to supply the arbitration agreement at all.[94]

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[88] *Glencore Grain Limited (UK) v. Sociedad Ibérica de Molturación, S.A. (Spain)*, Supreme Court, Spain, 14 January 2003, 16508/2003, XXX Y.B. COM. ARB. 605 (2005). See also *Shaanxi Provincial Medical Health Products I/E Corporation (PR China) v. Olpesa, S.A. (Spain)*, Supreme Court, Spain, 7 October 2003, 112/2002, XXX Y.B. COM. ARB. 617 (2005); *Satico Shipping Company Limited (Cyprus) v. Maderas Iglesias (Spain)*, Supreme Court, Civil Chamber, Plenary Session, Spain, 1 April 2003, 2009 of 2001, XXXII Y.B. COM. ARB. 582 (2007).

[89] *Czarina, L.L.C. v. W.F. Poe Syndicate*, Court of Appeals, Eleventh Circuit, United States of America, 4 February 2004, 358 F.3d 1286. See also *Guang Dong Light Headgear Factory Co. v. ACI Int'l, Inc*, District Court, District of Kansas, United States of America, 10 May 2005, 03-4165-JAR.

[90] *Aloe Vera of America, Inc (US) v. Asianic Food (S) Pte Ltd. (Singapore) and Another*, Supreme Court of Singapore, High Court, Singapore, 10 May 2006, OS 762/2004, RA 327/2005, XXXII Y.B. COM. ARB. 489 (2007) (the Court held that at this stage the "examination [...] is a formalistic one and not a substantive one"); *Seller v. Buyer*, Supreme Court, Austria, 22 May 1991, XXI Y.B. COM. ARB. 521 (1996); *Denmark Skibstekniske Konsulenter A/S I Likvidation (formerly known as Knud E Hansen A/S) v. Ultrapolis 3000 Investments Ltd. (formerly known as Ultrapolis 3000 Theme Park Investments Ltd.)*, High Court, Singapore, 9 April 2010, 108, 2010 S.L.R. 661.

[91] *Yukos Oil Co v. Dardana Ltd.*, Court of Appeal, England and Wales, 18 April 2002, [2002] EWCA Civ 543.

[92] *Denmark Skibstekniske Konsulenter A/S I Likvidation (formerly known as Knud E Hansen A/S) v. Ultrapolis 3000 Investments Ltd. (formerly known as Ultrapolis 3000 Theme Park Investments Ltd.)*, High Court, Singapore, 9 April 2010, 108, 2010 S.L.R. 661.

[93] See, above, para. 17, and the chapter on article VII, [A/CN.9/786], paras. 36-38.

[94] See also Bayerisches Oberstes Landesgericht [BayObLG], Germany, 11 August 2000, 4 Z Sch 05/00; Oberlandesgericht [OLG] München, Germany, 15 March 2006, 34 Sch 06/05; Kammergericht [KG], Germany, 10 August 2006, 20 Sch 07/04; Oberlandesgericht [OLG] Celle Germany, 14 December 2006, 8 Sch 14/05; Oberlandesgericht [OLG] München, Germany, 23 February 2007, 34 Sch 31/06.

67. Commentators have also taken the view that, under article IV(1)(b), an applicant need only provide prima facie proof that the arbitration agreement conforms to the formal requirements of article II.[95]

B. No requirement to prove the validity of the arbitration agreement

68. Closely related to the issue of whether or not an applicant must establish that the arbitration agreement which it has supplied meets the requirements of an "agreement in writing" is the question of whether, under article IV, an applicant must show that the arbitration agreement is valid.

69. Enforcing courts are in agreement that, under article IV(1)(b), an applicant need not prove the validity of an arbitration agreement and that it is for the party opposing enforcement to raise this issue under article V.[96]

70. For example, the English Court of Appeal held that, once an applicant provides an arbitration agreement that meets the requirements of article IV(1)(b), the burden shifts onto the defendant to prove that the arbitration agreement is not valid under article V(1)(a).[97] The Court of Appeal of Bermuda also held that an applicant is required to only provide the arbitration agreement, with the party opposing enforcement bearing the burden of making out a case with respect to the validity of the agreement.[98]

71. The same approach has been applied by courts in other jurisdictions, including Italy,[99] Spain[100] and Austria.[101]

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[95] ICCA'S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION: A HANDBOOK FOR JUDGES (P. Sanders ed., 2011), at 75.

[96] For a more detailed discussion on the burden of proof under article V, see the chapter on article V(1)(a).

[97] *Yukos Oil Co v. Dardana Ltd*, Court of Appeal, England and Wales, 18 April 2002, [2002] EWCA Civ 543. The approach in *Dardana* was followed by the High Court of Justice of England and Wales in *Dallah v. Pakistan* and by the High Court of Singapore in *Ultrapolis*. See *Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan*, High Court of Justice, England and Wales, 1 August 2008, [2008] EWHC 1901, at Annex 6, paras. 1-2; *Denmark Skibstekniske Konsulenter A/S I Likvidation (formerly known as Knud E Hansen A/S) v. Ultrapolis 3000 Investments Ltd. (formerly known as Ultrapolis 3000 Theme Park Investments Ltd.)*, High Court, Singapore, 9 April 2010, 108, 2010 S.L.R. 661.

[98] *Sojuznefteexport (SNE) v. Joc Oil Ltd.*, Court of Appeal of Bermuda, Bermuda, 7 July 1989, XV Y.B. COM. ARB. 384 (1990).

[99] *Jassica S.A. v. Ditta Polojaz*. Court of Cassation, Italy, 12 February 1987, 1526, XVII Y.B. COM. ARB. 525 (1992).

[100] *Union Générale de Cinéma, SA (France) v. X Y Z Desarrollos, SA (Spain)*, Supreme Court, Civil Chamber, Spain, 11 April 2000, 3536 of 1998, XXXII Y.B. COM. ARB. 525 (2007); *Strategic Bulk Carriers Inc. (Liberia) v. Sociedad Ibérica de Molturación, SA (Spain)*, Supreme Court, Civil Chamber, Spain, 26 February 2002, 153 of 2001, XXXII Y.B. COM. ARB. 550 (2007).

[101] *Seller v. Buyer*, Supreme Court, Austria, 22 May 1991, XXI Y.B. COM. ARB. 521 (1996).

72. The above approach finds support in the *travaux préparatoires* of article IV(1)(b)[102] and in commentary.[103]

C. No requirement to authenticate the arbitration agreement

73. While article IV(1)(a) requires the applicant to supply an authenticated copy of the award (or a certified copy), article IV(1)(b) does not mandate authentication of the arbitration agreement.

74. During the negotiation of article IV, the Belgian delegate proposed that the arbitration agreement be authenticated as well.[104] This was opposed by the French delegate who considered that the production of the arbitration agreement should not be subject to excessive requirements, particularly in light of the fact that many arbitrations were based on arbitral clauses agreed to in an exchange of correspondence.[105] The final text of article IV(1)(b) does not include an authentication requirement.

75. None of the court decisions reviewed contain any discussion on this point.

ARTICLE IV(2)

76. Article IV(2) requires the applicant to supply a translation of the award or the arbitration agreement if these are not made in an official language of the country in which recognition and enforcement is sought. The translations are to be provided in addition to the original documents and not in lieu thereof.[106] Article IV(2) further provides that such translations are to be certified by an official or sworn translator or a diplomatic or consular agent.

77. Under the rubric of article IV(2), enforcing courts have examined issues related to the law governing translation, the authorities competent to perform the translation, and the object of translation.

A. Governing law

78. Like article IV(1) which does not provide for an applicable law in relation to authentication and certification, article IV(2) does not provide for a law governing translations.

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[102] The delegate of the ICC at the Conference stated that "when there was a prima facie proof that the parties had agreed to submit their dispute to arbitration, it should be for the defendant to prove that the contrary was the case". *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Record of the Eleventh Meeting, E/CONF.26/SR.11, at 12.

[103] FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (E. Gaillard, J. Savage eds., 1999), at 968, para. 1673; ICCA'S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION: A HANDBOOK FOR JUDGES (P. Sanders ed., 2011), at 75; Dirk Otto, *Article IV*, supra at note 3, at 167.

[104] *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Records of the Seventeenth meeting of the United Nations Conference on International Commercial Arbitration, United Nations document E/CONF.26/SR.17, at 6-7.

[105] *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Records of the Seventeenth meeting of the United Nations Conference on International Commercial Arbitration, United Nations document E/CONF.26/SR.17, at 7.

[106] *Inter Maritime Management SA v. Russin & Vecchi*, Federal Tribunal, Switzerland, 9 January 1995, XXII Y.B. COM. ARB. 789 (1997).

79. Very little case law exists on the issue of governing law. In one case, a Swiss court stated that the certification of the translation by a translator or a consular or diplomatic agent needed to comply with the law of the seat of the arbitration and that this law could impose less stringent certification requirements or even dispose of such requirements entirely.[107]

80. The Austrian Supreme Court has held that the applicant is free to choose from either the law of the State in which the award was made or the law of the State in which enforcement is sought.[108]

B. Certification "by an official or sworn translator or by a diplomatic or consular agent"

81. Unlike article IV(1), article IV(2) does specify the authority competent to perform the certification of the translation: an official or sworn translator or a diplomatic or consular agent.

82. Applying this requirement, a Swiss court has denied enforcement in a case where the translation was certified not by an official translator or a diplomatic or consular agent, but rather by a notary public. However, it noted that the notary had certified only the authenticity of the copy of the arbitral award used for the translation.[109] The same court also added that, generally, a translation made by a third party and certified by a notary public who is capable of understanding the language of the translation could meet the criteria of article IV(2).

83. Article IV(2) does not indicate whether the official or sworn translator or the diplomatic or consular agent must be of the State in which the award was made or of the State in which enforcement is sought. Reported case law on this point is scarce. In line with its ruling on the law governing translation,[110] the Austrian Supreme Court has noted that the applicant is free to choose from translators either from the enforcing State or from the State in which the award was made.[111] Similarly, French courts have held that applicants do not need to submit a translation from a translator featuring on the list of experts of the enforcing court.[112]

C. The object of translation

84. Article IV(2) specifies that the object of the translation is the award and the arbitration agreement. In this context, courts have dealt with the issue of whether or not an applicant would meet the requirements of article IV if it provided translations of excerpts of these documents.

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[107] Court of Appeal of the Canton of Zug, Switzerland, 27 February 1998, JZ 1997/104.161.

[108] Supreme Court, Austria, 11 June 1969, 3, II Y.B. COM. ARB. 232 (1977).

[109] Court of Appeal of the Canton of Zug, Switzerland, 27 February 1998, JZ 1997/104.161.

[110] See supra, para. 49.

[111] Supreme Court, Austria, 11 June 1969, 3, II Y.B. COM. ARB. 232 (1977).

[112] *S.A.R.L. Synergie v. Société SC Conect S.A.*, Court of Appeal of Paris, France, 18 March 2004, 2001/18372, 2001/18379, 2001/18382; *Société GFI Informatique — SA v. Société Engineering Ingegneria Informatica S.P.A. et Société Engineering Sanita Enti Locali S.PA. (ex GFI SANITÀ S.P.A.)*, Court of Appeal of Paris, France, 27 November 2008, 07/11672.

85. An Austrian court held that the applicant should provide a full translation of the relevant document.[113] However, the court did not deny enforcement to the applicant, but rather, returned the case to the lower court and instructed it to afford the applicant an opportunity to provide a full translation.[114]

86. Swiss courts have taken a pragmatic approach in this regard. For example, a Zurich court accepted that the party supplying a translation of the arbitral agreement met the requirements of article IV by supplying a translation of the arbitration clause and not the entire contract.[115]

87. Moreover, the Swiss Federal Tribunal has ruled that a partial translation of an award met the requirements of article IV(2).[116] The court stated that based on a flexible, pragmatic and non-formalistic interpretation of article IV(2), the provision of only a partial translation of the arbitral award was sufficient, and that a more restrictive interpretation would run counter to the recognition and enforcement friendly spirit and objective of the Convention. It concluded that it would be too formalistic to require a translation of the full award in light of the fact that the applicant had presented the court with a translation that covered the *dispositif* of the award and the section on costs which was in dispute between the parties.

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[113] *D SA (Spain) v. W GmbH (Austria)*, Supreme Court, Austria, 26 April 2006, 3Ob211/05h, XXXII Y.B. COM. ARB. 259 (2007).

[114] Ibid. The same court has also explained that there is no requirement that dissenting opinions be translated given that dissenting opinions are not normally a part of the award.

[115] Court of Appeal of Zurich, Switzerland, 17 July 2003, XXIX Y.B. COM. ARB. 819 (2004). See also *R S.A. v. A Ltd*, Court of Justice of Geneva, Switzerland, 15 April 1999.

[116] Federal Tribunal, Switzerland, 2 July 2012, 5A_754/2011.